IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-21-00796

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

v

STEVEN HEATON

JUDGE:	HIS HONOUR JUDGE ROZEN
WHERE HELD:	Melbourne
DATE OF HEARING:	23 November 2022 & 3 April 2023
DATE OF SENTENCE:	19 April 2023
CASE MAY BE CITED AS:	DPP (Cth) v Heaton
MEDIUM NEUTRAL CITATION:	[2023] VCC 651

REASONS FOR SENTENCE

Subject:	CRIMINAL LAW
Catchwords:	Obtain financial advantage by deception – Quantum of $117,500 – Fraudulently inducing persons to invest money – Quantum of $975,000 – Guilty plea – Applicability of *Verdins* principles – Family hardship – No 'cogent evidence' adduced – Current sentencing practices – Term of imprisonment warranted – Combination sentence
Legislation Cited:	*Crimes Act 1958* (Vic); *Criminal Procedure Act 2009* (Vic); *Sentencing Act 1991* (Vic); *Crimes Act 1914* (Cth)
Cases Cited:	*DPP v Bulfin* [1998] 4 VR 114; *R v Lo* (2007) 174 A Crim R 451; *Worboyes v The Queen* [2021] VSCA 169; *R v Verdins* (2007) 16 VR 269; *Romero v The Queen* [2011] VSCA 258; *Brown v The Queen* (2020) 62 VR 491; *R v Verdins* (2007) 16 VR 269; *Charles v R* [2011] VSCA 399; *Brown v The Queen* (2020) 62 VR 491; *RJE v Secretary to Department of Justice* [2008] VSCA 265; *Markovic v The Queen* [2010] VSCA 105; *Totaan v The Queen* [2022] NSWCCA 75; *R v Esposito* [2009] VSCA 277; *Kovacevic v The Queen* [2021] VSCA 49; *DPP v Cini* [2014] VCC 1347; *DPP v Downes* [2021] VCC 572; J*ohnstone v DPP (Cth)* [2021] VSCA 95; *Tran v The Queen* [2014] VSCA 85; *R v Huttley* (1989) 43 A Crim R 176; *R v Ginies* [1972] VR 394; *DPP v Akkala* [2020] VCC 120; *DPP v Power* [2020] VCC 643; *Director of Public Prosecutions v Rocha (a pseudonym)* [2020] VCC 1865; *Kelly v The Queen* [2021] VSCA 216; *Dyason v R* [2015] VSCA 120

Sentence:	6 months' imprisonment – 2 year community correction order – s 6AAA declaration – 14 months' imprisonment

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APPEARANCES:	Counsel	Solicitors
For the DPP	Mr A. Dinelli SC and Ms A. Dixon	Commonwealth Director of Public Prosecutions
For You	Mr A. Forrester	Sinisgalli Foster Legal

HIS HONOUR:

1. Steven Heaton, you have pleaded guilty to two charges:

   i) One charge of obtaining a financial advantage by deception, namely the provision of loan for Independent Products Pty Ltd of $117,500 from the Sustainable Melbourne Fund by falsely representing to SMF that BHP Billiton Ltd had agreed to purchase and install 100 ERK Heating Ventilation and Cooling retrofit units to its Caval Ridge mine site;[1] and

   ii) One charge of fraudulently inducing persons being Robert Jolly, Geoffrey Frankish, Michael Fitzpatrick, Robert Magowan and Andrew Grieg to invest money totalling $975,000 with Independent Products Pty Ltd and HVPS Holdings by making statements, promises or forecasts which you knew to be misleading, false or deceptive, namely:[2]

      1 (a) BHP Billiton Ltd had installed ERK Heating Ventilation and Cooling retrofit units;

      2 (b) BHP Billiton Ltd had provided feedback on the installed ERK Heating Ventilation and Cooling retrofit units;

      3 (c) ERK Heating Ventilation and Cooling retrofit units being tested by BHP Billiton Ltd were showing positive results;

      4 (d) BHP Billiton Ltd had agreed to purchase or had placed an order for ERK Heating Ventilation and Cooling retrofit units.

2. These are offences against the Victorian *Crimes Act 1958* (Vic). They carry maximum penalties of 10 years' imprisonment and 15 years' imprisonment respectively. Although your case has been prosecuted by the Commonwealth DPP,

[1] Contrary to s 82(1) of the *Crimes Act 1958* (Vic).
[2] Contrary to s 191(1) of the *Crimes Act 1958* (Vic).

you are to be sentenced under Victorian law. This has a number of significant consequences for the Court which are discussed below.

3. Your conduct that makes up these charges occurred during a 17 month period between 31 August 2015 and 20 January 2017.

4. Before summarising the circumstances of your offending, it is necessary to briefly summarise the procedural history of your case as this explains some of the delay associated with its finalisation.

Procedural History

5. You originally faced nine charges on an indictment dated 16 July 2021.

6. By an application dated 29 September 2022, you applied for a sentence indication pursuant to s 208 of the *Criminal Procedure Act 2009* (Vic) (**CPA**). The application was not opposed.

7. The court received written submissions from the prosecution and defence.[3]

8. The agreed basis upon which the indication was to be given by the Court was a fresh indictment dated 10 October 2022. This charged you with:

   i) One charge of obtaining a financial advantage by deception; and

   ii) One charge of fraudulently inducing persons to invest money.

9. On 4 October 2022 I indicated pursuant to s 207 of the CPA that, if you pleaded guilty to the two charges, you would be convicted and sentenced pursuant to s 44(1) of the *Sentencing Act 1991* (Vic) to 9 months' imprisonment to be followed by a community correction order of a period of two years. The court must not impose a more severe sentence than this.[4]

[3] Outline of Defence Submissions on Sentence Indication Hearing dated 28 September 2022; Prosecution Submissions on Sentence Indication Hearing dated 30 September 2022.
[4] *Criminal Procedure Act 2009* (Vic), s 209.

10. On 17 October 2022 you accepted the indication and were arraigned on the two charges to which you pleaded guilty. The matter was adjourned to 16 November 2022 for plea and then was subsequently further adjourned to 23 November 2023.

11. The court received written submissions from the prosecution and defence.[5] Seventeen documents were attached to the Defence submissions as schedules. Among these were several character references and several medical reports. These are considered later in these reasons.

12. On 23 November 2022, Mr Dinelli SC, who appeared with Ms Dixon for the prosecution, read from a prosecution summary of the offending dated 8 November 2022. Mr Forrester, who appeared on your behalf, made submissions including that the court should find your moral culpability for your offending to be reduced by reason of your Bipolar Disorder.[6]

13. The plea hearing was adjourned part heard at the prosecution's request to 3 April 2023 to enable the Court to obtain:

    i) An assessment report concerning your suitability for a community correction order; and

    ii) A pre-sentence report from Forensicare.

14. The court received those reports (which are also discussed later in these reasons) and received further written submissions from the prosecution concerning the relevance of impaired mental functioning in this case.[7] Responding submissions were also filed on your behalf.[8]

15. The court heard further submissions from the parties on 3 April 2023 and adjourned the matter once more for consideration of the sentence to be imposed. These are the court's reasons for imposing that sentence.

[5] Outline of Defence Submissions on Plea dated 21 November 2022; Outline of Sentencing Submissions filed on behalf of the Commonwealth Director of Public Prosecutions dated 14 November 2022.
[6] Outline of Defence Submissions on Plea dated 21 November 2022, [34](a).
[7] Crown's Submissions on Relevance of Impaired Mental Functioning to Sentence dated 29 March 2023.
[8] Supplementary Submissions on Plea dated 30 March 2023.

5 The Offending

16. It is necessary to start with a summary of your offending conduct. The summary is drawn from the document read to the court by the prosecutor. That document was marked as exhibit ‘A’ on the plea and is annexed to these reasons.

17. HVPS and Independent Products were incorporated on 23 May 2014. The directors of each company were three people, you, Vahid Vakiloroaya and Ana Licina. The registered office of both companies was 1111, 152 Sturt Street, Southbank.

18. You, together with Vakiloroaya and Licina, established the Companies to commercialise an air-conditioning invention utilising pre-cooled air to achieve energy efficiencies, known as IP Hybrid and/or ERK. This was invented by Vakiloroaya.

19. As part of an agreement for the use of Vakiloroaya’s patent rights of the product, Vakiloroaya became a director of the companies, on the date the companies were established (being 23 May 2014).

20. On or about 7 April 2014 and 9 March 2015, Vakiloroaya entered into various deeds and agreements with the companies, in respect of the product’s intellectual property and patents.

21. HVPS was specifically established to hold the product’s intellectual property, whilst Independent Products was the sales entity.

22. In mid-2015, you, as director and Chief Executive Officer of the companies, held introductory meetings with senior staff of BHP, namely Davis, James and Lee. The purpose of the meetings was to seek the sale and installation of the product at BHP’s Caval Ridge mine site in Queensland. The Caval Ridge mine site is a joint venture between BHP and Mitsubishi Development.22

23. Following the introductory meetings, Davis became your initial primary contact at BHP.

24. BHP and you reached a verbal agreement that you would provide the units to BHP as a no-cost obligation trial, for the purpose of installation and monitoring in order to obtain field data about energy and efficiency savings. BHP also requested test data from You in order to substantiate the units' energy and efficiency savings. Senior BHP management required this as part of BHP's due diligence in putting together a business case in consideration of any form of capital expenditure being allocated on purchasing units.

25. Between July 2015 and August 2015, there was various correspondence exchanged between you, Davis and Lee in respect of BHP's air-conditioning specifications, electricity usage, humidity levels and temperatures of the areas that BHP operated in.

26. On 31 August 2015, you emailed Lee and Davis an unsigned BHP Purchase Order for 100 units. The Purchase Order was addressed to "Kenny Lee, Superintendent Engineering". The total sum of the Purchase Order was $148,500.00.

27. From approximately March 2016, James became your primary contact at BHP, replacing Davis.26 Despite this, you continued to interact with Davis, even though Davis continually referred You back to James.

28. In April 2016, BHP received two Air-conditioning Units at its Caval Ridge mine site, however the power meters required for installation were not received with the Air-conditioning Units.

29. In May 2016, you asked Davis to sign and place BHP's letterhead on a letter that you had drafted stating that BHP had installed the two units at its Caval Ridge mine site, and the installed units were achieving energy savings. Davis assumed what was written by you was correct as you had made representations to that effect to Davis. This was despite the fact that the Air-conditioning Units had not yet been installed.

30. By November 2016, arrangements had not yet been made between BHP and you to have the units installed. At this time, James received an email from you asking to

visit the Caval Ridge mine site in order to guide staff through the technology and the installation process.

31. Between November 2016 and February 2017, no progress of note occurred with the project. In late February 2017, James was still making arrangements with the installation vendor to get the units installed.

32. Towards the end of March 2017, James advised BHP's management that the units received at Caval Ridge had not yet been installed.

33. On 26 April 2017, due to the continued failure to install the two units, you, Gust (who by that time was the Chief Executive Officer of the Companies) and James had a three-way telephone discussion. During this discussion, Gust queried the progress of BHP's trial and purchase order. James informed Gust that no units had been installed, and that no purchase order had been placed.

34. On 27 April 2017, James and Gust spoke by telephone in the absence of you. James confirmed that no units had been installed, and that a number of emails concerning the purchase and installation of the units had been fabricated or "doctored".

35. The fabricated or "doctored" emails included:

> 6 (a) A fabricated email purportedly sent by James to you (copied to Chris Nemitz) on 12 December 2016 at 4.48pm with the subject line "AC energy efficiency ERK units". That email purports to confirm that BHP were satisfied with the results from the initial 2-unit trial, and that a further assessment would be undertaken with the 100-unit order place. The email also purports to set up an installation time for the 100 units. James did not send this email.
>
> 7 (b) An altered email purportedly sent by James to Chris Nemitz (copeid to you) on 16 November 2016 at 10:26pm with the subject line "AC energy efficiency – installation." That email purports to set up a time for installation of

the rest of the ERK units. James was the author of part of the email up until the words “Are you or Dan available next Wednesday to run through the…” but was not the author of the remainder of the email. The altered email also contains the subject line “AC energy efficiency – installation” whereas the original email contained the subject line “AC energy efficiency trial – install method”.

8 (c) A fabricated email purportedly sent by you to James dated 16 November 2016 at 10:00pm with the subject line “Next Site visit.” That email thanks James for the confirmation to supply 100 units. James denied receiving this email from you in an email to Gust.

36. BHP did not commit to purchasing any units from you or the companies, nor did it install any units, nor produce trial data.

37. The Sustainable Melbourne Fund, referred to herein as “SMF”, was established by the City of Melbourne in 2002 as a revolving loan fund to invest in delivering triple bottom line outcomes. The purpose of SMF was to demonstrate the City of Melbourne’s commitment and leadership in pursuing its eco-city vision.

38. In 2019, SMF was recapitalised and renamed the Sustainable Australia Fund, referred to herein as “SAF”.

39. SAF seeks to provide fixed interest loans to companies and businesses focusing on projects which seek to reduce their impact on the environment. It also provides money to businesses to improve their environmental and financial outcomes. SAF also actively looks for funding projects in the market.

40. On 19 May 2015, you made initial contact with SMF through its general email address ‘info@sustainablemelbournefund.com.au’. You introduced the product and made representations about its energy efficiency.

41. Throughout August 2015, you communicated with the SMF about the product and made representations that BHP were interested in installing the product, and conduct testing and a cost benefit analysis, before placing a large order. The SMF also understood that BHP would trial 50 units for their Caval Ridge mine site, and that once BHP were satisfied with the results, they would look to order another 1520 units for the same site.

42. On 1 September 2015, you emailed Lambden of SMF and stated that:

> 9 PO – BHP – signed off this week, already verbally agreed to this amount. financial analysis on whole project. We need the funding on the initial 100 units. on completion of this the follow-up PO will be for the rest of the site on CAVAL RIDGE. total 1740 units. So funds for the 100 units to the value of the PO attached, which would then be rolled into the funding for the balance of 1740 units over a 7 year term. Please note with the 100 unit order we will also be able to do analysis of network cost savings in detail...

43. Attached to this email was a completed SMF Investment Application Form requesting a loan of $135,000.00 and the unsigned Purchase Order dated 31 August 2015 addressed to Lee.

44. On 18 September 2015, and after various email communications between SMF and you regarding the provision of further information, you emailed Bocskay at SMF the fraudulent signed Purchase Order.

45. On or around 5 October 2015, the Investment Sub-Committee approved the provision of the SMF loan to Independent Products. The loan approval was given as a result of correspondence with you and representations by you concerning the purported involvement of BHP, and BHP's commitment to the purchase of 100 units with further expected orders.

46. On 14 October 2015 at 3:49pm, Lambden emailed the SAF Board of Trustees the Independent Products loan proposal for final approval. On the same date, at 10:46pm, You emailed Lambden the fraudulent signed Purchase Order.

47. On 15 October 2015, the SAF Board of Trustees formally approved the loan to Independent Products.

48. On 9 November 2015, SMF entered into the loan contract with Independent Products, lending it $117,500. The SAF document labelled “Agreement” contained the Offer to Borrow, the Schedule, the Condition, Annexure A (“Drawdown Notice”), Annexure B (“Escrow Terms”) and Annexure C (“SMF branding Guidelines”).

49. Item 6 of the Agreement stated that the purpose of the loan was “[t]o provide project finance for the installation of 100 ERK Heating Ventilation and Cooling (HVAC) retrofit units to the BHP Caval Ridge mining site”.

50. The loan amount was drawn down into the bank account of Independent Products on 9 November 2015.

51. Following the drawdown of the loan, and for the next six months following, Independent Products fell into arrears.

52. Repayments to SMF did not commence until February 2016. Further late payments were made in March and April 2016. Following the appointment of a new CFO at Independent Products, Hodgkinson, repayments to the loan occurred seamlessly.

53. On or around May 2017, Bocskay had a conversation with the former directors of Independent Products during which he was advised that you had been fired from your position as a director of Independent Products, the BHP Purchase Order had been doctored, and the directors of the companies had resigned from their positions.

54. On 25 September 2017, Bocskay emailed Frankish and Vakiloroaya. Vakiloroaya was a former director of Independent Products and guarantor to the loan.

Vakiloroaya emailed Bocskay the same day and replied that he did not recognise the document and that he did not sign the guarantee.

55. Around March 2018, SAF learned that Independent Products had been placed into administration on 21 February 2018 and that it had been named as an unsecured creditor to the amount of $71,026.42.

56. SAF recovered most of its loan through repayments against you and Licina but wrote-off the balance of approximately $6,000. Following the write-off, SAF had no further dealings with Independent Products or you.

57. The total amount of the financial advantage obtained by deception in relation to SMF was $117,500.00.

58. That is the conduct constituting charge 1.

59. You made a statement, promise or forecast which you knew was misleading, false or deceptive to induce Jolly to enter into an agreement to lend money to Independent Products contrary to s 191(1)(a)(i) of the Crimes Act 1958 (Vic).

60. Jolly was the former Treasurer of Victoria from 1982 to 1990, and is currently the Chairman of the Utilities Trust of Australia – a $6 billion fund focused on long term infrastructure investment.

61. Jolly first came to know you in or around mid-2015 after You sent him an unsolicited message via LinkedIn. You invited Jolly to meet up to discuss an energy efficient product, to which Jolly agreed.

62. At this first meeting, you said you respected Jolly, his standing and experience and that he wanted him to chair each of the Companies. You explained that the companies held patents to an air-conditioning attachment or unit that could achieve energy savings through the pre-cooling of condensate water before it was put through the system, and that he had been in discussions with BHP who had expressed a strong interest to test the units and place an order.

63. Approximately two to three weeks after the first meeting, Jolly met with you again. At this meeting, you showed him a copy of the (fraudulent) signed BHP Purchase Order.

64. In or around late 2015, Jolly met with Frankish. Jolly advised Frankish that you had approached him to chair the companies. Jolly explained that the companies were developing and selling an air-conditioning efficiency unit that could be refitted to air conditioners.

65. Frankish advised that he was part of an investor group which included Fitzpatrick, Magowan, Greg Turnidge and himself. They are referred to herein, collectively, as the “Investor Group”.

66. On 29 November 2015, Frankish emailed Jolly in order to set up an initial meeting between the Investor Group and you.

67. On or around December 2015, the first meeting took place between the Investor Group and you. Jolly was also present at this meeting. The purpose of the meeting was to allow you to make an initial pitch to the Investor Group, to explain the product and to assess its current progress.

68. At the first meeting, Jolly recalls that:

10 (a) You said that an order with BHP had been achieved;

11 (b) the Investor Group asked various questions; and

12 (c) Jolly would be Chair of the companies before any investments were made.

69. On or around 25 February 2016, following his verbal agreement, Jolly agreed to chair the companies. Jolly entered into a written agreement which set out various conditions, including duties, termination conditions and remuneration.

70. In or around April 2016, a second meeting took place between the Investor Group, Jolly, you, and Vakiloroaya. At the second investor meeting, You took the Investor

Group through a PowerPoint presentation. The existence of the BHP purchase order was mentioned numerous times by you during the meeting.

71. The purchase order itself was provided to the Investor Group on or around the same time as the second meeting.

72. In early May 2016, Jolly was party to emails between you and the Investor Group concerning the BHP purchase order. In an email dated 3 May 2016, You says the following:

> 13 …[Delivery] was changed after we had an issue with a young engineer that confused the finance operations manager from BHP for them to sign off on the whole deal after I visited the site last year. So we had to go back to square one though we had the PO for 100 units and try to get them into the camp. in the end we had to install on mine site due to the recalcitrant engineer. And this has been done. We will provide a letter from BHP signed off on their letterhead that provides evidence the trial has started and is in line with expected outcomes…

73. On 9 June 2016, Jolly became a director of the companies, along with you, Vakiloroaya and Licina.

74. On or around 1 June 2016, Jolly entered into a Loan Deed with Independent Products and lent it $25,000. Jolly made the payment to Independent Products in three tranches – $10,000 on 5 May 2016, $10,000 on 6 May 2016, and $5,000 on 9 May 2016. The reason that Jolly made this loan to Independent Products was because he perceived Independent Products had cash flow issues for various reasons, including because BHP had not paid its deposit. Jolly confirms that when he agreed to the loan he did so that it was a “short term solution”, on the basis that Independent Products would be receiving payment from BHP. Jolly says that he would not have loaned the money were it not for you having told him about the interest from BHP and the achievement of the BHP Purchase Order.

75. Between late 2016 and early 2017, Jolly became concerned that BHP had not paid its account. On 17 February 2017, Jolly emailed you and stated that you needed to obtain the deposit from BHP for their order of the 100 units and that this was a “high priority issue” that needed to be clarified.

76. Subsequent discussions took place between Jolly and you regarding payment from BHP. The nature of those discussions concerned Jolly’s inability to able to speak to anyone from BHP regarding the status of the payment and the performance results BHP had produced. Further, during various Board meetings whilst Jolly was Chairman, You was asked questions about the progress of BHP and why it had not paid its account. Jolly recalls you said things to the effect that BHP had performed tests, that the results were good, they would not provide the reports as they were commercially sensitive and that they were usually very slow at paying.

77. On 27 April 2017, whilst overseas, Jolly was told about the falsity of BHP’s purported involvement in the purchase of the units. He also received emails to that effect.

78. In or around May 2017, upon learning of that the BHP purchase order and test results had been falsified, Jolly resigned as director and chairman of the Companies.

79. Frankish is the former Head of Infrastructure at Goldman Sachs, and previously worked for Credit Suisse and the Victorian Department of Treasury and Finance. He is now retired.

80. Frankish came to know of you in a meeting with Jolly in or around late 2015. Frankish was informed by Jolly in the course of that meeting that Jolly had been approached by You, who had introduced Jolly to the product. You had hoped to commercialise the product, and wanted Jolly to chair HVPS and Independent Products (the companies). Frankish considered the product to be interesting and timely.

81. Not long after this meeting, Jolly informed Frankish that he had agreed to chair the Companies.

82. Frankish then met with you and Jolly together in late 2015. In that meeting, you introduced yourself and discussed the product from a high-level perspective. Little or no paperwork concerning the product was provided to Frankish at that stage.

83. Based on his interest in the product, Frankish contacted Fitzpatrick and Magowan, who were colleagues during his time at the Department of Treasury and Finance. On 29 November 2015, a meeting was then organised between Fitzpatrick, McGowan and Frankish (that is, the members of the Investor Group) and you.

84. On or around 1 December 2015, the First Investor Group Meeting occurred where the members of the Investor Group met with you and Jolly to discuss the product. At this meeting, you explained the fundamentals of the product, the market conditions that it would operate in, how it would be brought to market, and the current business situation. Jolly's participation in this meeting only involved asking questions regarding the technical aspects of the product.

85. Although Frankish was impressed by the product, he had not yet decided to invest in the Companies.

86. Frankish continued to meet with you and the rest of the Investor Group in the period December 2015 to February 2016. During that time, you made representations regarding BHP's interest in the product. Specifically, you made representations to the effect that BHP:

14 (a) was involved with and testing the product, with positive results;

15 (b) was compiling the results of its testing into a report which they were prepared to provide to You for marketing and sales purposes;

16 (c) would purchase 100 units of the product to fit air-conditioners on the site where the testing was being conducted; and

17 (d) were likely to make a larger order following on from their initial order of 100 units.

87. Your representations regarding BHP's involvement gave Frankish confidence that the product was working.

88. The decision by Frankish to invest in Independent Products was based on your previous representations concerning BHP's involvement, and particularly that BHP, which Frankish recognised as a substantial potential customer with a reputation for doing exhaustive due diligence,102 had undertaken promising testing of the product and intended to buy additional units.

89. In or around April 2016, Frankish attended a further meeting with you, Jolly and the Investor Group. This meeting was also attended by Vakiloroaya and Hodgkinson. At the meeting:

18 (a) Vakiloroaya gave a technical presentation which impressed Frankish;

19 (b) a PowerPoint presentation was shown; and

20 (c) you made representations to the effect that the sale of further product units to BHP was progressing, but that BHP had not yet provided the results of its testing.

90. In or around May 2018, Frankish met with you in person at 88 Collins Street, Melbourne. In the course of this meeting, you informed Frankish that he was under pressure at the time and was acting in the spur of the moment.

91. Fitzpatrick is currently a director of Latam Autos, and was previously an investment banker with Merrill Lynch, CS First Boston, and Hastings Fund Management. He was also formerly the director of various organisations including the Australian Football League and Rio Tinto.

92. Fitzpatrick learned of you from Frankish, who Fitzpatrick had known for some time. Fitzpatrick was initially informed that you was attempting to commercialise an air conditioning efficiency device.

93. In or around late 2015, Fitzpatrick met with Jolly, whom Fitzpatrick had known from his previous employment at the Victorian Department of Treasury and Finance. At this meeting, Jolly mentioned you and the product, and enquired whether Fitzpatrick was interested in learning more.

94. In or around February 2016, Fitzpatrick met again with the Investor Group and you. At that meeting, you stated that BHP had four units operating on site and that 100 units were about to be ordered.

95. The attendees also discussed possible manufacturing sites for the product. Following this meeting, Fitzpatrick agreed with the rest of the Investor Group's decision to invest in the Companies by way of the Convertible Loan Note Deed, which Fitzpatrick executed as part of the Investor Group.

96. Fitzpatrick's decision to participate in the Convertible Loan Note Deed was based on your representations up to that point, and particularly that:

21 (a) the product was novel;

22 (b) BHP's installation of the product, as represented by You, lent it credence; and

23 (c) the commercial aspect of the product had already appeared to produce results and statistics – Fitzpatrick understood BHP to have replicated the results obtained by Vakiloroaya during internal testing of the product.

97. On 12 February 2016, Fitzpatrick transferred the sum of $33,333 from his Westpac Bank account (ending 2581) to Independent Product's nominated account pursuant to the Convertible Loan Note Deed.

98. Fitzpatrick agreed to this further investment because:

24 (a) he was satisfied that BHP had by that point ordered 100 units of the product that Independent Products Pty Ltd was manufacturing;

25 (b) BHP had purportedly confirmed that the product was successful – the tests performed to that time had not proven to be incorrect by BHP; and

26 (c) it appeared inevitable that BHP would order a further 300 to 400 units of the product.

99. Magowan is the former CEO of Merrill Lynch Australasia, and previously worked for the Victorian Treasury and was an Economist at the Reserve Bank of Australia. He is currently semi-retired, and continues to manage his own private investments.

100. Magowan first heard of you around late 2015 after a meeting with Frankish, who was a former colleague from the Victorian Treasury. During the meeting, Frankish said things to the effect that:

27 (a) he had been approached by you about a novel air-conditioning attachment that could achieve efficiency gains;

28 (b) there was a potential opportunity to form an Investor Group, consisting of Fitzpatrick, Magowan and himself, to invest in the product; and

29 (c) he wanted to see whether Magowan was interested in investing.

101. Following the conversation, Magowan agreed to meet with you to learn more about the potential investment.

102. On 29 November 2015, Frankish organised a meeting between Fitzpatrick, McGowan and Frankish (ie. the Investor Group), Jolly and you.

103. The meeting took place on 1 December 2015 and was attended by the Investor Group, Jolly and you. At this meeting, you presented and said things to the effect that:

30 (a) you had arranged for BHP in Queensland to carry out tests of the product;

31 (b) BHP were in the process of carrying out tests;

32 (c) preliminary testing had shown a 25-40% efficiency savings in the product; and

33 (d) you had raised around $100,000 from SMF for the purposes of a pre-order from BHP.

104. The novelty of the product and BHP's involvement stood-out for Magowan.

105. Following the December meeting, Magowan learned that you had incorporated two companies, HVPS and Independent Products.

106. In or around February 2016, the Investor Group attended a further meeting with you, which involved discussions about what form an investment might look like, whether it would be an equity investment or debt funding. At the time of this meeting Magowan was not notified of any changes in relation to the representations you had made in December.

107. In or around February 2016, Magowan and the Investor Group agreed to invest in the companies. Magowan reached this decision based on your representations, and in particular:

34 (a) The novelty of the idea;

35 (b) BHP's involvement, which Magowan believed gave currency to the idea; and

36 (c) the SMF's involvement.

108. Following the December meeting, Magowan learned that you had incorporated two companies, HVPS and Independent Products.

109. Greig is a former Senior Vice-President and Executive Director of Human Resources for Bechtel Corporation and also the former President of the Mining and Metals Global Business Unit. He is currently the non-executive Chairman and Founder of ACAC Innovation Pty Ltd (ACAC) – a company focused on angel

investing, that is, investing in early stage start-up companies and either being involved with them, such as by sitting on the board, or passively as a silent investor.

110. Greig first came to know you in or around early-2016 after a former colleague, Butler, said that he wanted to connect Greig with you. At the suggestion of Butler, Greig approved for his contact details to be passed onto you.

111. In or around early May 2016 you telephoned Greig. During that telephone conversation you made representations to the effect that:

37 (a) you had created a company called Independent Products;

38 (b) Independent Products was moving to commercialise air-conditioning efficiency units which would improve the life-span of air-conditioners, particularly in hot environments;

39 (c) some reputable investors were involved;

40 (d) the Air-conditioning Units product was patented; and

41 (e) the product had gained traction with some major customers – including BHP.

112. Following the initial phone call, you and Greig had several further discussions. During those further discussions You made Greig aware that:

42 (a) HVPS was the holding company of Independent Products;

43 (b) Jolly was the chairman of the Companies;

44 (c) the Investor Group, which consisted of Magowan, Frankish and Fitzpatrick, had invested in the companies through a Convertible Loan Note;

45 (d) BHP was heavily involved with the business, it was conducting a trial of the product and had made an initial order for several hundred units.

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114. During these discussions, Greig was impressed that BHP was involved. He was aware from his prior employment at Bechtel that BHP was the “Rolls Royce” of the mining industry. Further, he formed the view that Independent Products would already be on the way to successful commercialisation with BHP’s involvement.

115. Following his conversations with you, Greig decided to invest on behalf of ACAC in the companies. In making that decision Greig was satisfied that the investment fulfilled his four personal criteria, namely that:

50 (a) you appeared to be a quality person with passion, enthusiasm and intensity;

51 (b) you was working on the business in a full-time capacity, and had Hodgkinson in the role of Chief Financial Officer;

52 (c) the product was somewhat revolutionary and new to the market, which Greig could ascertain given his employment background in the energy sector; and

53 (d) there was a likelihood of making 10 times the money invested, given your representations about BHP’s involvement (i.e. BHP was heavily

involved with the business, it was conducting a trial of the product and had made an order for several hundred units).

116. In or around early-May 2016, you made an initial investment proposal to Greig.

117. That is the conduct constituting charge 2.

54 Objective Seriousness of Offending

118. I accept the prosecution's characterisation of your offending as objectively serious. However, it is not at the more serious end of the spectrum of such cases. The features that lead to my assessment are:

i) You engaged in a deliberate and quite sophisticated fraud which involved a number of targets;

ii) The sophistication is evidenced by the nature of those who were defrauded – a financial lending organisation and highly experienced business people including a former treasurer of this State;

iii) You obtained over $1m through that fraud;

iv) The period of offending was 17 months; and

v) The offending involved a clear breach of trust.

119. You are therefore to be sentenced for what I characterise as moderately egregious examples of what are, in turn, serious crimes as indicated by the maximum penalties.

55 Impact of Offending

120. No Victim Impact Statements have been filed.

121. It is an agreed fact that you and your wife Dr Licina repaid most of the money that you borrowed from the Sustainable Melbourne Fund.

122. The question of the impact on the five investors who are the subject of charge 2 is not straightforward. You have not repaid that money. However, your counsel submitted that the Court should not conclude that their losses amount to the $975,000 they invested.

123. On your behalf it was submitted that the impact on the five investors 'has been negligible'.[9] This is based on the value of the HVPS patents which the court was informed is the subject of ongoing litigation.[10]

124. In the circumstances, while I can't accept the impact was negligible, I am unable to reach a firm conclusion about the impact of your offending on the investors. What is clear is that you benefitted from receiving their money and that you did so dishonestly.

56 Personal Circumstances

125. You were born into a sibship of three in Newcastle in 1973 and are now 50 years old. You enjoyed an unremarkable childhood and did well at school. You left school at 15 to take up an apprenticeship as an electrician.

126. Eventually you completed your schooling and studied at University before securing employment with a business before being 'pushed out'. You told Dr Battacharya that during this time you were behaving in a somewhat similar manner to the way you behaved while you offended in 2015-17.[11]

127. You and your first wife had two children but the marriage failed. The children are now adults but you don't see them.

[9] Outline of Submissions on Plea dated 21 November 2022, [54].
[10] Outline of Submissions on Plea dated 21 November 2022, [30]-[31]
[11] Forensicare Psychiatric Court Report prepared by Dr Elena Bhattacharya dated 23 February 2023, [24].

128. After working in Hobart for a while you moved to Melbourne where you met your current wife Ana in 2013. She soon became pregnant and you were under financial pressure as you were also supporting the children of your first marriage.

129. It was at this time in 2015 that you invested $150,000 of your savings in air-conditioning products. You read about a scientist in Sydney called Vahid who had a novel idea that you needed to act upon. From this time on you worked very long hours trying to make the business work. It was at this time that you started to engage in the conduct that led to you being charged.

130. Currently, you are performing home-making duties looking after your two young children. Your wife, Dr Ana Licina is an anaesthetist who works shift work. In a letter to the court she has explained that your support has made it possible for her to function in this demanding role.[12] In her letter, Dr Licina states that a long sentence of incarceration will negatively impact on your two sons.

131. The court also received character references in support of you from:

i) Christopher Heaton, your younger brother;[13]

ii) Anthony Heaton, your elder brother;[14]

iii) Ron Belle Isle, a family friend with whom you have conducted business since 2005;[15] and

iv) Dr Andrew Silvers, a colleague of your wife.[16]

132. Each of these people speak of your good character and the stress you were under in the period of offending. I accept what they say but, as the prosecution has submitted, good character is given less weight in 'white collar' offending such as this than is generally the case in the criminal law. This reasoning was explained in the

[12]Letter from Dr Ana Licina dated 13 October 2022.
[13]dated 11 October 2022.
[14]dated 11 October 2022.
[15]dated 21 October 2022.
[16]dated 22 October 2022.

1998 case of *DPP v Bulfin*.[17] This is because general deterrence is required to be the predominant sentencing consideration.[18]

57 Other Matters in Mitigation of Sentence

133. You have pleaded guilty to the charges in acceptance of responsibility for your offending. While your plea was not made at the earliest opportunity, it saves considerable court time in a case such as this where many witnesses would be called and many documents tendered if there was a trial. The utilitarian benefit of your plea is considerable especially given the backlog in this court due to the pandemic.[19]

134. Your counsel has submitted that the court should accept that your moral culpability for your offending is reduced and ameliorate your sentence accordingly. In deference to the detailed submissions from the parties on this topic, I will address the submission at some length starting with a discussion of the relevant legal principles.

58 Verdins – the Principles

135. It is well established that an offender's *moral* culpability, as contrasted with their *legal* responsibility, may be diminished due to the effect of a mental disorder from which they suffer either at the time of their offending or at the time sentence is to be imposed. In *R v Verdins,*[20] the Court of Appeal explained that impaired mental functioning 'may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility'.

136. In such a situation, the condition will affect the punishment that is just in all the circumstances, and 'denunciation is less likely to be a relevant sentencing objective'. The impairment of mental functioning must contribute to, but need not have caused, the offending behaviour. This means that it must be established that the offender's disablement had the effect of 'impairing [their] ability to exercise appropriate

[17][1998] 4 VR 114, 131.
[18]*R v Lo* (2007) 174 A Crim R 451, [28].
[19]*Worboyes v The Queen* [2021] VSCA 169.
[20] (2007) 16 VR 269, [32].

judgment or impairing [their] ability to make calm and rational choices, or to think clearly at the time of the offence'.[21]

137. On the other hand, and this is a point made in the prosecution's submissions,[22] where the impairment is enduring or permanent or likely to recur, the causal connection with the offending 'may point to a heightened need for community protection'.[23] In such a case, the court will need to carefully assess the risk of the offender re-offending.[24]

138. An offender's mental health at the date of sentence may also be relevant to sentencing in a way that is mitigatory if the court accepts that the condition will mean:

59 i) that 'a given sentence will weigh more heavily on the offender than it would on a person in normal health';[25] or

60 ii) that there is a 'serious risk of imprisonment having a significant adverse effect on the offender's mental health.[26]

139. The *Verdins* principles are and should be regarded as 'exceptional'.[27] It is for the offender to establish on the balance of probabilities the facts that enliven the *Verdins* principles. This will normally be done by expert evidence which must be 'rigorously scrutinised' by the sentencing court.[28]

61 Submissions

140. On your behalf, it was submitted that you suffered at the time of offending from an impairment of mental functioning (being Bipolar Disorder) that 'reduces [your] moral culpability of [sic.] the offending conduct'.[29] Further, your counsel

[21] *Romero v The Queen* [2011] VSCA 258, [13].
[22] Crown's Submissions on Relevance of Impaired Mental Functioning to Sentence dated 29 March 2023, [39]-[42].
[23] *Brown v The Queen* (2020) 62 VR 491, [70]
[24] *Brown v The Queen* (2020) 62 VR 491, [72].
[25] *R v Verdins* (2007) 16 VR 269, [32], limb 5.
[26] *R v Verdins* (2007) 16 VR 269, [32], limb 6.
[27] *Charles v R* [2011] VSCA 399, [162].
[28] *Brown v The Queen* (2020) 62 VR 491, [6].
[29] Outline of Defence Submissions on Plea dated 21 November 2022, [34](a).

submits that 'general deterrence and specific deterrence should be moderated or eliminated as a sentencing consideration due to the nature and severity of symptoms exhibited by Mr Heaton, and the effect of the condition on the mental capacity of Mr Heaton at the time of the offending and the date of sentence'.[30] Finally, it was submitted that limb 5 of *Verdins* is relevant because 'a prison sentence will weigh more heavily on [you] than a person of normal health and limb 6 is applicable because 'imprisonment will have a negative impact on [your] already fragile health'.[31]

141. After the matter was adjourned, and with the benefit of the comprehensive Forensicare report prepared by Dr Elena Bhattacharya, the prosecution submitted that any causal connection between your mental impairment and your offending 'should be regarded, at its highest, as only partial'.[32] The prosecution submitted that 'the carefully planned and executed nature of the offending suggests that any moderation of moral culpability by reason of the offender's mental impairment must be slight at best'.[33]

142. Mr Dinelli SC and Ms Dixon also submitted that the experts do not grapple with your 'poor engagement with mental health treatment to date'.[34] They submit that this is relevant to your rehabilitative prospects and 'indicates a need for increased weight to be given to the need for community protection'.[35] As they put it, 'the evidence of mental impairment pulls weakly in both directions, such that its overall impact on the appropriate disposition may ultimately be neutral'.[36]

143. In his supplementary submissions on this point, Mr Forrester on your behalf contended that the evidence before the court demonstrates that 'your offending behaviour was a result of poor judgment and poor decision-making, due to grandiose

[30] Outline of Submissions on Plea dated 21 November 2022, [34] (b).
[31] Outline of Submissions on Plea dated 21 November 2022, [34] (c), (d).
[32] Supplementary Submissions on Plea dated 30 March 2023, [18].
[33] Crown's Submissions on Relevance of Impaired Mental Functioning to Sentence dated 29 March 2023, [21].
[34] Crown's Submissions on Relevance of Impaired Mental Functioning to Sentence dated 29 March 2023, [38]
[35] Crown's Submissions on Relevance of Impaired Mental Functioning to Sentence dated 29 March 2023, [39].
[36] Crown's Submissions on Relevance of Impaired Mental Functioning to Sentence dated 29 March 2023, [42].

beliefs and impulsivity – being symptoms of Mr Heaton's bipolar disorder'.[37] Your counsel's ultimate submission was:

> *62 Given the enlivenment of Verdins, and the evidence of the impact of a custodial sentence on Mr Heaton, Mr Heaton asks that the Court consider a lengthy CCO with tailored community work and psychiatric treatment with a non-custodial sentence or short custodial sentence.*[38]

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65 The Evidence

144. Dr Ilan Rauchberger is a consultant psychiatrist who first consulted with you in January 2018 and saw you on 5 occasions over the next 2 months. He next saw you in January 2022 and again in November of that year.

145. Dr Rauchberger's report dated 10 November 2022 responded to a series of eleven questions he was asked by your solicitors. It appears he was not asked if he had diagnosed you with a mental illness. Whether that be the case or not, he does not refer to any diagnosis in his 4-page report. While noting that your wife reported at the time of their meeting on 5 February 2018 'that she believes he has Bipolar Affective Disorder', Dr Rauchberger makes no reference to himself having made such a diagnosis.

146. Subsequent to the court raising at the hearing on 23 November 2022 the lack of a diagnosis of any mental illness by Dr Rauchberger, he prepared a further report dated 23 December 2022. In that report, he explained that he diagnosed you in 2018 with Bipolar Affective Disorder in remission. He explained that following his re-examination of you in January 2022, his opinion regarding your diagnosis had not changed.

[37] Supplementary Submissions on Plea dated 30 March 2023, [13].
[38] Supplementary Submissions on Plea dated 30 March 2023, [34].

147. Dr Rauchberger prescribed mood stabiliser medication Zeldox 40mg daily in 2018. You have used this 'intermittently over the years'.[39] In November 2022 you told him you were taking 20 mg daily. Having assessed you as depressed, he increased the dose to 40 mg daily. He recommended 'at various times' that you see a psychologist but is not sure if you have ever done so.[40]

148. Your treating doctor was not asked to express and opinion on any link between your condition and your offending.

149. In this regard, your counsel relies on the opinion of Dr Antonella Ventura, Consultant Psychiatrist. At the request of your solicitors, Dr Ventura saw you for 1 ½ hours on 18 October 2022 and has produced a report dated 27 October 2022.[41]

150. Dr Ventura states that you reported to her that Dr Rauchberger 'diagnosed bipolar affective disorder and prescribed ziprasidone 40 mg daily, and, antipsychotic medication and Cipramil 10 mg daily, an antidepressant medication'.[42]

151. Dr Ventura did not have access to the report prepared by Dr Rauchberger dated 10 November 2022.[43] Rather, Dr Ventura relied upon a brief report dated 13 October 2022 from your general practitioner, Dr Jackson, which states that Dr Rauchberger reported to Dr Jackson that he, Dr Rauchberger, had 'made a diagnosis of Bipolar Affective Disorder'.[44] Dr Ventura concludes that you 'presented with a history and a mental state examination consistent with a DSM-5 diagnosis of bipolar affective disorder, type 1'. You appear to have in the past 'developed psychotic grandiose delusions'.[45]

152. Dr Ventura notes that your condition was only diagnosed in 2017 after your offending. Nonetheless, Dr Ventura notes that you 'reported symptoms consistent with a manic phase' at the time of the offending. Dr Ventura refers to your

[39] Report of Dr Ilan Rauchberger dated 23 December 2022, 2.
[40] Report of Dr Ilan Rauchberger dated 23 December 2022, 2.
[41] Report of Dr Antonella Ventura dated 27 October 2022.
[42] Report of Dr Antonella Ventura dated 27 October 2022, 3.
[43] Dr Ventura lists the reference material she accessed at p 2 of her report.
[44] Letter of Dr Anne Jackson dated 13 October 2022.
[45] Letter of Dr Anne Jackson dated 13 October 2022, 5.

'grandiosity' and opines that 'because of [your] mental illness, [you] did not believe that [you were] doing anything wrong'. Your judgment was 'clearly impaired'.[46]

153. Dr Ventura considers that you are unlikely to re-offend 'as long as [you] remain engaged with [your] treating psychiatrist and continue to take the psychotropic mood stabilising medications prescribed and [you are] monitored by [your] treating psychiatrist'.[47]

154. Finally, Dr Ventura opines that a custodial sentence will 'fracture psychiatric continuity of care and increase [your] risk of relapsing into a hypomanic state' which will 'increase [your] risk of re-offending in future'.[48]

155. Dr Battacharya interviewed you by video link for 45 minutes on 3 February 2023 and read a number of documents including the reports from Dr Rauchberger and Dr Ventura. She agrees with Dr Ventura that you were suffering from bipolar affective disorder between August 2015 and January 2017.[49]

156. Dr Battacharya considers that you were suffering from this condition during the offending period and there is evidence that you suffered from both a manic episode and depressive episodes. Dr Battacharya considers that it is difficult to say with certainty how your mental state was at specific times between 2015 and 2017. However, she is able to state that you were suffering from a manic episode during the period which 'appeared to impact [your] decision making and [your] judgment at the time'. According to Dr Battacharya, your grandiosity and impulsivity led you to make decisions and take actions that were out of character professionally.[50]

157. Addressing your rehabilitation prospects, Dr Battacharya concludes that if you continue to take your medication, engage with a psychiatrist and possibly explore psychological therapy then your prognosis is good.[51]

[46]Letter of Dr Anne Jackson dated 13 October 2022, 6.
[47]Letter of Dr Anne Jackson dated 13 October 2022, 6.
[48]Letter of Dr Anne Jackson dated 13 October 2022, 6.
[49]Letter of Dr Anne Jackson dated 13 October 2022, 11.
[50]Letter of Dr Anne Jackson dated 13 October 2022, 12.
[51]Letter of Dr Anne Jackson dated 13 October 2022, 13.

158. Finally, Dr Battacharya considers that a custodial sentence would increase your risk of mental deterioration and that your diagnosed condition 'would place a heavier burden on [you] than a person with normal psychological functioning'.[52]

66 *Verdins* – Consideration

159. Based on the evidence of Dr Ventura and Dr Battacharya, I have accepted your counsel's submission that the evidence before the Court establishes that you suffered from Bipolar Affective Disorder at the time of your offending and that it compromised your judgment and decision-making ability to some extent. As you told Dr Battacharya, you thought you could 'revolutionise the world through air-conditioning'.[53] I have concluded that your judgment was compromised 'to some extent' because the opinion of Dr Battacharya is no more than that your condition 'appeared' to impact your decision-making. I have also had regard to the degree of planning and deliberation that went in to the doctoring of emails and other documents that were central to your offending.

160. It follows from this finding that I assess your moral culpability, as opposed to your legal responsibility to be somewhat reduced in accordance with *Verdins* limb 1. Denunciation is a less significant sentencing consideration than would otherwise be the case.

161. I also conclude that general deterrence is to be moderated as a sentencing consideration to a small extent.[54]

162. Mr Dinelli SC and Ms Dixon for the Director have submitted that there are limitations in the expert reports and specifically that the authors 'cannot explain why the offender permitted the deception to continue after symptoms of mania and hypomania abated'.[55] The difficulty I have with this submission is that the prosecution did not seek to cross examine either of the experts. In the circumstances I will accept

[52]Letter of Dr Anne Jackson dated 13 October 2022, 13.
[53]Forensicare Psychiatric Court Report prepared by Dr Elena Bhattacharya dated 23 February 2023, [33].
[54]*R v Verdins* (2007) 16 VR 269, [32], limb 3.
[55]Crown's Submissions on Relevance of Impaired Mental Functioning to Sentence dated 29 March 2023, [17].

their unchallenged and uncontradicted expert opinions based as they appear to be on cogent evidence.[56]

163. However, as submitted by the prosecution, there are competing considerations in respect of specific deterrence. While under limb 4 of *Verdins* I am also inclined to moderate this sentencing consideration, I am concerned that your less than fulsome implementation of the treatment recommendations made by Dr Rauchberger raises the risk of future relapses on your part if you are once again exposed to the sorts of stressors that triggered your condition between 2015 and 2017. I have concluded that because your condition may recur, there is a heightened need for both specific deterrence and community protection.[57]

67 Family hardship

164. You and your wife have two young children. In answer to a question from the court, your counsel Mr Forrester advised that, if you were imprisoned, and because your wife works full time, arrangements would need to be made for the children's care that would involve them travelling to Perth to be cared for by their grandparents. He informed me that they may need to be removed from school. No evidence was called or presented to the Court about this. If evidence had been called, alternative arrangements such as a full time Nanny may have been able to be explored.

165. If your children had to be moved, this would obviously be highly disruptive to their lives. Third party hardship such as this may be taken into account by a sentencing court under Victorian law in limited circumstances.

166. Family hardship is generally only a mitigating circumstance in sentencing if it will cause 'exceptional hardship'.[58] To establish exceptional hardship, an accused must

[56]Cf *RJE v Secretary to Department of Justice* [2008] VSCA 265, [16]-[18].
[57]*Brown v The Queen* (2020) 62 VR 491, [70].
[58]*Markovic v The Queen* [2010] VSCA 105. The position would be different if you were being sentenced under Commonwealth law – see *Crimes Act 1914* (Cth), s 16A(2)(p) as interpreted in *Totaan v The Queen* [2022] NSWCCA 75.

produce ‘cogent evidence’. The evidence must establish that the situation is so exceptional that ‘it would be, in effect, inhuman’ to take it into account.[59]

167. The principle is applied ‘as an exercise of mercy properly extended by the court in such a case’.[60] The Court of Appeal has recognised that ‘there must always be a place for the exercise of mercy where the circumstances warrant it’.

168. In response to a direct question from the Court about whether you seek to rely on this principle, your counsel stated that you do not. Mr Forrester informed the Court that he did not seek to persuade me that ‘exceptional circumstances’ exist in your case. Mr Dinelli SC for the prosecution also submitted your case is not exceptional within the meaning of the law.[61]

169. In these circumstances, I have not considered whether your case meets the ‘exceptional hardship’ standard. The court has not been provided with ‘cogent evidence’ that would have enabled me to make this assessment. I have, however, taken into account in mitigation of your sentence, the additional difficulty you will face in custody as a result of the uncertainty about the welfare of your children.

68

69 Current Sentencing Practices

170. A court must have regard to current sentencing practices which can assist in the assessment of the case before it. Both the prosecution and defence referred the court to cases that they submitted were comparable.[62] I have looked at all of those cases. Such cases are not precedents and offer only limited assistance in sentencing you. You must be sentenced based on the facts and circumstances of your case.

[59] *R v Esposito* [2009] VSCA 277, [14].
[60] *Kovacevic v The Queen* [2021] VSCA 49, [53].
[61] Outline of Sentencing Submissions on behalf of the Commonwealth Director of Public Prosecutions dated 14 November 2022, [13].
[62] The prosecution referred the Court to *DPP v Cini* [2014] VCC 1347; *DPP v Downes* [2021] VCC 572; *Johnstone v DPP (Cth)* [2021] VSCA 95; *Tran v The Queen* [2014] VSCA 85; *R v Huttley* (1989) 43 A Crim R 176; and *R v Ginies* [1972] VR 394.

171. In most of the cases to which counsel referred, the offender received a custodial sentence. In some cases, the period of imprisonment was significant.

172. In some cases decided in this Court in recent years, offenders have been sentenced to combination sentences involving community correction orders and periods of imprisonment of less than one year.[63] Your counsel referred me to the case of *Director of Public Prosecutions v Rocha (a pseudonym)*[64] where a straight community correction order was imposed. In that case, the offender obtained in excess of $130,000 by deceiving a resident of an aged care facility. The sentencing Judge found that the offences, while a serious breach of trust, were committed under the coercion of the offender's partner who she feared and this enlivened the *Verdins* principles to reduce her moral culpability. It was an unusual case which is readily distinguishable from yours.

173. In the recent case of *Kelly v The Queen,*[65] the offender pleaded guilty to a rolled-up charge of obtaining property by deception contrary to s 81(1) of the *Crimes Act 1958* (Vic). The amount involved was a little over $154,000. The offending occurred over nine months. He was 48 years old when sentenced and suffered from an adjustment disorder. His plea was early and he was a man of good character. The case has some similarity to yours. His sentence in this Court of 2 years' imprisonment on that charge was upheld by the Court of Appeal on appeal.[66]

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71 Conclusions

174. Sentencing under Victorian law proceeds by way of what is referred to as instinctive synthesis. A court must take into account and synthesise all relevant considerations and impose a sentence that is appropriate.

[63] See *DPP v Akkala* [2020] VCC 120; *DPP v Power* [2020] VCC 643.
[64] [2020] VCC 1865.
[65] [2021] VSCA 216.
[66] The offender was also sentenced in respect of other dishonesty charges which attracted a higher maximum penalty. The total effective sentence of 5 years and 6 months with a non-parole period of 3 years and 5 months was described by the Court of Appeal as 'moderate': [2021] VSCA 216 at [40].

175. The purposes for which sentence may be imposed are identified in s 5(1) of the *Sentencing Act 1991* (Vic). The matters to which the court must have regard are outlined in s 5(2)(a)-(g).

176. In a case such as the present one where a charge (charge 2) is expressed to be a 'course of conduct' charge, the court must impose a sentence that 'reflects the totality of the offending that constitutes the course of conduct'.[67] What that means here is that the sentence I impose on charge 2 must reflect that there were five victims and five separate amounts of money involved.

177. The court must not impose a custodial sentence unless it considers the purposes for which the sentence is imposed cannot be achieved by a community correction order.[68]

178. As noted, your counsel has submitted that either a standalone 'lengthy' Community Correction Order or such an order combined with a short custodial sentence, is the appropriate disposition in your case.

179. I consider that the principal purposes for which sentence should be imposed are general and specific deterrence, punishment, promotion of your rehabilitation and protection of the community. The need for general deterrence in a case such as this was explained by Charles JA in the well-known case of *DPP v Bulfin* to which reference has earlier been made**.**

180. The Court of Appeal has frequently cited this case in recent years as a reminder of the importance of general deterrence in sentencing white collar fraud cases.[69]

181. On balance, having regard to all of the above considerations, I am satisfied that the purposes for which the sentence must be imposed in your case cannot be achieved by a community correction order alone. The egregiousness of your conduct means you must serve some time in custody.

[67] *Sentencing Act 1991* (Vic), s 5(2F).
[68] *Sentencing Act 1991* (Vic), s 5(4) and (4C).
[69] See, e.g., *Dyason v R* [2015] VSCA 120 at [38]; *Kelly v The Queen* [2021] VSCA 216 at [39].

182. I accept that the principal sentencing consideration, being general deterrence, should be moderated somewhat in light of the evidence now before the Court, in particular the report of Dr Battacharya. It is also important to reflect the very long period of time between the offending in 2017 and today during which the case has hung over your head but during which you have not re-offended. In light of these considerations, I have therefore reduced the period of imprisonment from the period of nine months that was part of the sentence indication to six months.

183. The purpose of the CCO is both to punish you beyond the punishment involved in the custodial sentence but also to promote your rehabilitation.

72 Orders

184. On charge 1, obtaining a financial advantage by deception, you are convicted and sentenced to 3 months' imprisonment.

185. On charge 2, fraudulently inducing persons to invest, you are convicted and sentenced to 5 months' imprisonment.

186. The sentence on charge 2 is the base sentence.

187. One month of the sentence on charge 1 is to be served cumulatively on the charge 2 sentence.

188. The Total Effective Sentence of imprisonment is 6 months.

189. You are also sentenced to a Community Correction Order of 24 months' duration which is to commence immediately upon your release from custody.

190. Mr Heaton, I need to explain to you the standard terms attached to all community correction orders and I will go through those now. Listen carefully, please:

73 • You must not commit, whether in or outside Victoria, during the period of the order, an offence punishable by imprisonment.

74 • You must comply with any obligations or requirement prescribed by the regulations.

75 • You must report to and receive visits from the Secretary or their delegate during the period of the order.

76 • You must report to the Community Correction Centre specified in the order within two clear working days after the order comes into force, that is, within two clear working days of the date when you are released from prison.

77 • You must notify the Secretary or their delegate of any change of address or employment within two clear working days after the change.

78 • You must not leave Victoria except with the permission of the Secretary or their delegate either generally or in relation to a particular case.

79 • You must comply with any direction given by the Secretary or their delegate that is necessary for the Secretary or their delegate to give to ensure you comply with the order.

191. In addition to those general conditions which apply to every community correction order I impose the following special conditions to the order that I impose on you:

80 • You must report to Melbourne Justice Centre within two working days of your release;

81 • You must complete 200 hours of unpaid community work;

82 • Treatment and rehabilitation for mental health as directed;

- 50 hours of treatment and rehabilitation are to count against the hours of community work; and

83 • You are to be supervised, monitored and managed as directed by the Secretary or their delegate.

192. Mr Heaton, under the law I cannot make a community correction order unless you agree to the terms and conditions. I note that you agreed to them when you were assessed for suitability for the order. I need to ask you now, do you agree to comply with the community correction order and the terms and conditions which I have set out?

193. You must understand, Mr Heaton, that if you contravene any of the conditions of the order, which will commence when you are released from prison, then that in itself is an offence punishable by a maximum of three months' imprisonment. Should that occur you will be brought back before this court and it is possible that, depending upon the circumstances, the order will be cancelled and you will be ordered to serve a term of imprisonment instead.

194. Pursuant to s 6AAA of the *Sentencing Act 1991* (Vic), but for your plea of guilty, I would have imposed a sentence of 14 months' imprisonment.

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